FROM DEMSETZ TO DENG: SPECULATIONS ON THE IMPLICATIONS OF CHINESE GROWTH FOR LAW AND DEVELOPMENT THEORY

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> A free and robust market can thrive only . . . where individual freedoms and property rights are accorded respect and where redress for violations of such rights can be found in fair and equitable courts.[1]
>
> Maria Dakolias, Chief Counsel of the World Bank's Legal and Judicial Reform Practice Group

> China's been enormously successful against poverty. I don't think that we've ever seen anything in human history that's comparable.[2]
>
> Martin Ravallion, Director of the World Bank's Development Research Group

I. INTRODUCTION

No one needs to be reminded any more of China's turn to market capitalism. China's growth since 1978 when Deng Xiaoping initiated market reforms has been among the longest sustained periods of high growth in modern history.[3] Few would challenge the assertion, meanwhile, that China has grown without an effective legal system.[4]

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1. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168 (1995-1996).

2. Research - Q&A with Martin Ravallion on Poverty in the Developing World, http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:21881699~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html#q13 (last visited Sept. 9, 2008) [hereinafter Ravallion Q&A].

3. It has certainly been the fastest growing developing country since the 1980s. *See* BARRY NAUGHTON, THE CHINESE ECONOMY 3 (2007). When put in the context of other East Asian "miracles," China's achievements, while impressive, no longer appear unique. See Martin Wolf, *China Has Further to Grow to Catch Up with the World*, FIN. TIMES, Apr. 13, 2005, at 19 (Wolf uses data from economic historian Angus Maddison to argue that Japan, Taiwan, and South Korea had similarly extended periods of rapid growth). *See also* KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 237-42 (2006).

4. I do not mean to imply any particular failing when compared to other poor countries. Both Kenneth Dam and Randall Peerenboom have pointed out that China does not do that badly in the World Bank and other

For those interested in the relationship between law and economic development, however, it is almost as if those thirty years of growth have not taken place. Few scholars have addressed the theoretical implications of China's economic success,[5] and the belief that the "rule of law" is a prerequisite to sustained growth remains remarkably strong.[6] Given the mag-

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cross-national rankings of world legal systems when compared to other developing countries, which Peerenboom stresses is the appropriate standard. When law and development theorists argue for property rights, however, they do not make this distinction. *See* DAM, *supra* note 3, at 234-37, 247-55; RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? 198-99 (2007) [hereinafter CHINA MODERNIZES].

5. The exceptions tend to be East Asian specialists as opposed to mainstream development economists. *See, e.g.*, Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829 (2000); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM J. COMP. L. 90 (2003); and Franklin Allen et al., *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 57 (2005). Related issues were addressed earlier and from a broader geographical and policy perspective in WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (1993). *See also* DAM, *supra* note 3; Kevin E. Davis, *What Can the Rule of Law Variable Tell Us about Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141 (2004); and Michael Trebilcock and Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization* 32-42 (University of Toronto Legal Studies Research Series, Paper No. 08-10), *available at* http://ssrn.com/abstract=1084571.

6. Two examples should suffice. In 2004 Kevin Davis noted, "It is now widely accepted that markets are unlikely to function in the absence of bodies of contract law and systems of property rights" and that "the 'rule of law' is an essential pre-condition to development." Davis, *supra* note 5, at 142-43. Three years later Michael Trebilcock and Paul-Erik Veel concurred that "it has become conventional wisdom amongst most economists that, whatever else the state does, it should provide effective institutions and processes to protect private property rights and enforce contract rights, which are regarded as pre-requisites to efficient and dynamic market economies." Trebilcock and Veel, *supra* note 5, at 4. All three of these law and development scholars are skeptical of these beliefs, but occasional academic skepticism notwithstanding, most theorists of economic growth remain steadfast in their belief that property and contract rights are indispensable for economic growth. For discussions of the persistence of these beliefs, see generally Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, *in* THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 203, 205 (David M. Trubek & Alvaro Santos, eds., 2006) [hereinafter New LND] (stating that "law itself has become a constitutive element of development: respect for the rule of law; the implementation of particular institutions; and the recognition of certain legal rights have become definitional to the achievement of development itself"); Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* New LND,

nitude and durability of the Chinese economic boom, the persistence of theoretical axioms that would declare that success impossible is puzzling.

This article tries to understand how rule of law orthodoxy can not only survive China's three decades of economic boom, but also remain a standard prescription for poor countries hoping to grow.[7] Part II reviews the argument that development requires clearly defined and legally enforceable property rights. I begin with the conventional wisdom on the relationship between property rights and economic growth, and then place these beliefs in the context of the institutional economics created by scholars from Ronald Coase and Harold Demsetz to Douglass North. I close Part II by examining how development theorists and practitioners have reacted to the fact of China's growth without formal property rights, and find that these experts almost universally fail fully to credit China's economic success, or to consider the implications it might have for the postulated link between property rights and growth. Part III describes the role of property rights in Chinese growth. I begin with an evaluation of China's legal institutions during its period of rapid growth and conclude that, whatever the strengths of China's legal system, the vigorous enforcement of clear property rights was not one of them. I then present a few examples of the informal institutions that the Chi-

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supra, at 253 (stating that "[t]he idea that the legal system is crucial for economic growth now forms part of the conventional wisdom in development theory"); and Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER F. WORLD AFF. 49-61 (2009) (stating at 50 that "The rule-of-law field continues to radiate an almost constant sense of discovery. Policy actors and aid practitioners keep discovering it and become seized with enthusiasm . . . .").

7. The latest example to cross my desk is John D. Sullivan et al., *The Importance of Property Rights to Development*, 27 SAIS REV. 31, 31, 35, 37 (2007), in which the authors claim, *inter alia*, that: "More than any other single factor, a sound property rights regime" will "motivate an entrepreneurial spirit in individuals"; that "property rights must be established and respected by government and fairly enforced through a legal system"; and that "the granting of basic property rights . . . is absolutely necessary" to "the emergence of a true market economy." At the time of the article, the authors were involved in development efforts at the Center for International Private Enterprise, a non-profit affiliate of the U.S. Chamber of Commerce and part of the National Endowment for Democracy. CIPE programs are in part supported through the United States Agency for International Development. Center of International Private Enterprise, About CIPE, http://www.cipe.org/about/index.php.

nese have relied on to provide economic stability and of situations where the formal institutions designed to protect such interests failed to function as intended. I find that while the failure of formal property protections in China has led to injustice, it cannot be said to have hindered growth. Part IV speculates on why the Chinese experience has had so little impact on how we think about the interaction of markets and law. I consider a few hypotheses, including Eurocentrism, the tendency of economists to focus on the quantitative analysis of formal institutions rather than the details of how societies function in practice, and the unwillingness of development professionals to face the possibility that property rights may not be necessary for economic growth. Part V concludes with some thoughts on the roles of property rights in economic growth and in political and social development.

Before proceeding, it is important to define the parameters of my claim that property rights have not been necessary to Chinese economic growth. First, I define property rights as claims that are defined by formal legal processes and institutions, that is, through legislation or judicial decision, and that are enforceable by government-provided courts. I exclude from this definition social or religious norms or private dispute resolution networks located outside the state, whether consciously created to replace formal legal institutions as in commercial arbitration or organically created by sub-national entities such as ethnic or kinship groups. I agree that Chinese economic actors required security in their investments and predictability in their exchanges, but I disagree that formal legal institutions—legislation, courts, and so on—were necessary to satisfy these conditions.

Second, I use the terms "economic growth" and "economic development" advisedly to mean "a *per capita* long-run rise in income"[8]—the original metric for development before Amartya Sen and others broadened the concept to include freedom, human capabilities, and other non-economic aspects of social welfare.[9] I do not deny that property rights over the past three decades might have allowed China to achieve higher levels of development in this wider sense, but I see no

8. Douglass C. North & Robert P. Thomas, The Rise of the Western World: A New Economic History 1 (1973).

9. Amartya Sen, Development As Freedom (Knopf, 1999).

evidence that they would have led to faster economic growth. Indeed, strong protection of preexisting property rights in China might have slowed or even halted growth because of the transaction costs involved in the transfer of property rights from less to more productive uses.[10]

Third, I do not deny that property rights, even as I narrowly define them, are desirable and important, whatever their immediate impact on gross domestic product (GDP). There is currently strong demand in China for property rights to clarify the relationships among people with regard to valuable assets and to give average citizens a politically safe means to resist an overreaching state and its business allies. In other words, I emphatically agree with those who call for robust property rights, but for reasons very different from those of the conventional law and development literature. Like E.P. Thompson, who famously concluded in the context of eighteenth-century England that the rule of law was, despite its cynical manipulation and abuse, "an unqualified human good,"[11] my reasons are political, not economic. China does not need property law to create wealth, but to manage it and to provide some measure of justice in the face of the social dislocation that inevitably accompanies rapid economic growth.

II. Law and Development Theory and the Chinese Experience

In this Part I look at how law and development theory has reacted to Chinese development, but first, a brief review both of the conventional wisdom and its theoretical foundation will be helpful.

A. *Contemporary Theory of Property Rights and Economic Growth*

Although the law and development literature on property rights is complex, the World Bank in 1996 captured the fundamental assumption well:

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10. I have made this argument elsewhere in the context of nineteenth-century America's transition from agriculture to industry. *See* Frank Upham, *Mythmaking in the Rule of Law Orthodoxy, in* Promoting the Rule of Law Abroad: In Search of Knowledge 75, 81-83 (Thomas Carothers ed., 2006).

11. E. P. Thompson, Whigs and Hunters: The Origin of the Black Act 266 (1975).

> Property rights are at the heart of the incentive structure of market economies. They determine who bears risk and who gains or loses from transactions. In so doing they spur worthwhile investment, encourage careful monitoring and supervision, promote work effort, and create a constituency for enforceable contracts. In short, fully specified property rights reward effort and good judgment, thereby assisting economic growth and wealth creation.[12]

According to this view, law is necessary to create and maintain a sophisticated market. Without enforceable contract rights, exchange will not be possible beyond the most basic kinds of barter. Without property rights, investment will not occur because investors will not be able to protect their assets from private theft and state expropriation. In both instances, the instrument of rights enforcement is an independent, honest, and competent judiciary. Restated, the thesis is that property rights determine who has control over assets; contract law enables market participants to exchange those assets in complicated transactions; and the courts enable market actors to plan by resolving disputes predictably, efficiently, and in accordance with the legal rules. According to this conception, while legally unenforceable exchange can occur in networks and communities with high levels of trust, complicated transactions among strangers, upon which large-scale growth depends, cannot take place without these elements.

Although enjoying a theoretical pedigree dating back to Max Weber, attention to legal systems within development economics can be traced to an attempt by World Bank General Counsel Ibrahim Shihata to explain the failure of many Bank projects because of what he characterized as ineffective governance in developing countries.[13] For Shihata, good governance should be understood as:

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12. WORLD BANK, FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT 48-49 (1996) [hereinafter FROM PLAN TO MARKET].

13. This story has been told often. *See, e.g.*, Upham, *supra* note 10, at 77-78; Rittich, *supra* note 6, at 213-14; and Santos, *supra* note 6, at 267-273. The impetus for this memo was not simply Shihata's zeal for legal reform. As General Counsel, he was concerned that World Bank interest in reforming governance in developing countries would implicate the Bank in political issues, which would be a violation of the Bank's Charter. The rule of law was an alternative approach to improved governance that had the advantage of

> [A] system, based on abstract rules which are actually applied, and on functioning institutions which ensure the appropriate applications of such rules. This system of rules and institutions is reflected in the concept of the rule of law,

which Shihata characterizes as consisting of five elements:

> 1) There is a set of rules which are known in advance,
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> 2) such rules are actually in force,
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> 3) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures,
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> 4) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial body, and
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> 5) there are known procedures for amending the rules when they no longer serve their purpose.[14]

Shihata's argument found fertile ground and inspired a series of cross-national studies of world legal systems conducted largely by economists affiliated with the World Bank.[15] These studies found strong correlations between levels of the "rule of law" and development, and the key to improving governance soon was understood to be legal reform. The research that followed has consisted primarily of data on the quality of legal systems through collected polls, surveys, and interviews of businessmen and their lawyers, with researchers then evaluating legal systems through such variables as the protection of property rights, the enforcement of contract, judicial independence, and the level of corruption.

A few examples will illustrate the nature of these data. Perhaps the best known ranking of countries by rule of law is the private publication known as the International Country Risk Guide, which ranks 140 countries on their respect for the rule of law based on surveys of a group of unidentified ex-

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appearing as a non-political improvement in the government's technical managerial capabilities. *See generally* IBRAHIM F. I. SHIHATA, THE WORLD BANK LEGAL PAPERS 244-82 (2000).

14. SHIHATA, *supra* note 13, at 273.

15. Not all of these studies were affiliated with the World Bank, and not all of them focused on governance per se. *See generally* Davis, *supra* note 5, at 148-56; DAM, *supra* note 3, at 31-49.

perts.[16] Similarly, the World Bank Institute annually ranks the quality of governance in more than 200 countries including a "rule of law" dimension that incorporates various legal variables. A third influential example is the World Bank's Lex Mundi project, which evaluates the judiciaries of 109 countries by interviewing lawyers about the number of procedural steps and amount of time necessary to collect on a bad check and evict a tenant. Researchers in these and other studies then relate this type of data to the countries' rates of growth and have found not only a correlation between the quality of a country's rule of law and its rate of economic growth but also a causal connection.[17]

Accompanying these studies has been an expansion of judicial reform projects aimed at enhancing the judiciary's role in economic growth. As of 2004, the World Bank alone had sponsored as many as 600 judicial reform projects in over 100 countries.[18] The assumption underlying these projects has been that a certain type of rule of law is necessary to create a stable investment climate by facilitating transactions and securing property and contract rights. As the then-chief counsel of the World Bank's Legal and Judicial Reform Practice Group

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16. *See* Davis, *supra* note 5, at 148. The ICRG is independent of the World Bank but is one of two sources of cross-national data whose use in published studies is described as "High" by the bank. *Id.* at 149 n.27. The number of 140 countries is taken from Table 1 in Daniel Kaufmann et al., *Governance Matters* 21 (World Bank Institute, Policy Research Working Paper No. 2196, 1999), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,contentMDK:20790066~menuPK:1976990~pagePK:64168445~piPK:64168309~theSitePK:1740530,00.html.

17. Kaufmann et al. find that their empirical results indicate a "strong positive causal relationship from improved governance to better development outcomes." Kaufmann et al., *supra* note 16, at 15. Davis states, "All of these studies generally find positive correlations between the legal variables that they employ and measures of development, and their results are commonly cited in key World Bank publications advocating legal reforms in developing countries. Over the past decade, in a strong display of legal optimism, the World Bank has made significant investments in funding these types of reforms." Davis, *supra* note 5, at 145. Davis then critiques both the methodology and value of these studies. *Id.* at 145-48. They are also evaluated in DAM, *supra* note 3. *But see* SANTOS, *supra* note 6, at 285 n.101 (citing Linn Hammergren, *Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries*, *available at* http://go.worldbank.org/IPJOPU38X0 (arguing that much of the conventional wisdom about what courts do and why reform is necessary is in fact wrong)).

18. Santos, *supra* note 6, at 253 n.1.

phrased it, "A free and robust market can thrive only in a political system where individual freedoms and property rights are accorded respect and where redress for violations of such rights can be found in fair and equitable courts."[19] The emphasis on courts has remained constant despite changes in the wider development community that have led to at least a rhetorical rejection of the one-size-fits-all template for reform, a recognition that informal norms play a crucial role in market performance, and the widespread acceptance that development should include poverty reduction, attention to the status of women, indigenous communities, popular participation in goal setting, and other dimensions of development sometimes lumped together as "the social."[20]

B. *How Development Economics Came to the Law*

Economists have not always been so interested in legal systems and certainly did not consider them essential to economic growth until recently.[21] To the extent that economists paid attention to poor countries at all, the prevailing wisdom was that the problem was simply money.[22] Thinking on growth was dominated by the importance of savings and by the assumption that developing countries had an almost unlimited amount of underemployed rural labor.[23] Pump in more savings, whether internally or externally supplied, invest in industry, and the workers would flow to the factories, so this thinking went. Low wages meant profit, which would in turn

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19. Dakolias, *supra* note 1, at 168 (citing Ronald Coase's "The Problems of Social Cost," which she characterized as "arguing that allocative efficiency will be ensured once clear property rights are established and guaranteed by the government, and that the government does not need to intervene further, because once private parties have clearly defined property rights, they can bargain for an efficient outcome").

20. *See generally* Rittich, *supra* note 6.

21. *See* H. W. Arndt, Economic Development: The History of an Idea 9-49 (1989) (presenting a history of the concept of development).

22. William Easterly has characterized this view as "wonderfully simple." William Easterly, The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics 29 (2001).

23. *See id.* at 30. *See also* Michael P. Todaro, Economic Development 84-89 (Addison Wesley, 7th ed., 1999) (for theories of Sir Arthur Lewis).

prompt further investment, which again would benefit from the constant wage, until, presto, the country "took off."[24]

In hindsight, this model seems simplistic, optimistic, ethnocentric, and arrogant, but hindsight spawns its own arrogance. Three twentieth-century experiences dominated the minds of economists at that time: the Great Depression, the Soviet Union's rapid industrialization, and Europe's recovery under the Marshall Plan. Economists saw each of these experiences as evidence that the addition of capital to a country with surplus labor will lead to sustained development through industrialization and urbanization. Add to this intellectual context the Cold War and the perceived necessity of engendering growth in the Third World, and the development of this model, often referred to as the "financing gap" model, may have been inevitable.[25]

Nonetheless, it failed.[26] A detailed account of the failure is not necessary for our purposes, but suffice it to say that the model encountered, as Michael Todaro put it, "empirical problems."[27] By the 1980s, neoclassical economics, with its emphasis on the market in all its dimensions from free trade to a minimalist state, took center stage.[28] Like linear growth models, neoclassical development models were fundamentally simple and optimistic.[29] On the macroeconomic level, they

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24. The phrase originated with W. W. Rostow, the best known proponent of what is known as the "linear stages theory" of growth. TODARO, *supra* note 23, at 79-83. *See also id.* at 82 ("In the absence of government, the growth rate will be directly related to the savings rate."); EASTERLY, *supra* note 22, at 29.

25. EASTERLY, *supra* note 22, at 30-31.

26. *Id.* at 39-40. William Easterly tested the "add money and it will grow" assumption by tracing the relationship between levels of investment in a four year period and growth in the subsequent four year period. Of 138 countries surveyed, results in only four economies supported the hypothesis, what Easterly called "an unusual assortment: Israel, Liberia, Réunion (a tiny French colony), and Tunisia."

27. TODARO, *supra* note 23, at 87.

28. *Id.* at 95. For an argument that "financing gap" development economics lives on, but should "finally be put to rest," *see* EASTERLY, *supra* note 22, at 44.

29. Dependency theory with its belief that the terms of trade were stacked against developing countries was an exception to the belief that there an easy answer to the development questions, but it was overwhelmed by the neoclassical approach. *See* TODARO, *supra* note 23, at 91-94; EASTERLY, *supra* note 22, at 229-31.

prescribed a shift from project loans aimed at increasing production to structural adjustment lending aimed at low inflation, balanced budgets, and realistic exchange rates. On the microeconomic level, the model dictated the privatization of state-owned enterprises and the reform of financial and labor markets to emphasize the role of property rights and labor mobility. In many ways neoclassical economics still dominates development economics and related disciplines, but it does so in the much more complex form of institutional economics.

The reason for the demise of neoclassical economics in its purest form is familiar: It failed. Its stringent economic discipline worked no better than the financing gap model's strategy of throwing money at the problem, and development practitioners began to look for other approaches. The search increasingly focused on how poorly many developing country governments functioned and especially on their incompetent bureaucracies and legal systems. As this emphasis on the weakness of developing country governments grew, the international financial institutions turned to institutional economics for both an explanation for previous failures and a path to future successes, and institutions came to dominate the third stage of economic development thinking.[30]

David Trubek, a scholar of law and development since its inception in the 1960s, has summarized the message of institutionalism as follows:

> Growth would be best achieved if the state stayed out of the economy except to the extent that—through law—it provided the institutions needed for the functioning of the market. These included guarantees for property rights, enforcement of contract, and protection against arbitrary use of government power and excessive regulation. All this was packaged as "good governance" and deemed important both to stimulate domestic growth and attract foreign investment.[31]

The emphasis on markets was not new, but the insistence that the success of development efforts would depend on the

30. DAM, *supra* note 3, at 5.

31. David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, *in* THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 74, 85 (David M. Trubek & Alvaro Santos eds., 2006).

proper functioning of a country's fundamental institutions, and particularly its courts, was.[32]

This focus on courts and specifically on property law has its theoretical origins in Ronald Coase's "The Problem of Social Cost."[33] In response to the government's redistributive role in the welfare economics of the 1950s, Coase argued that a primary function of government in a market economy was to enforce property and contract rights, thereby allowing private parties to bargain to efficiency regardless of the initial distribution of rights or resources. Although Coase recognized that transaction costs will in practice create market failure and the need for government intervention, the theoretical possibility of private bargaining in the shadow of judicial enforcement of legal rights was a powerful lure to development officials disillusioned by the governmental incompetence that the World Bank had identified as a major cause of the disappointing results of the 1970s and 1980s.

Harold Demsetz built on Coase's insights to bring property rights to the foreground. Recognizing that transaction costs will often prevent Coasian private bargaining from taking place, Demsetz in *Toward a Theory of Property Rights*[34] argued that the assignment and nature of property rights are extremely important to the performance of the market. Market failure was most likely, he argued, in instances of commonly or publicly owned property. He also stressed the importance of clearly defined private property rights for the market to approach efficiency. He emphasized two aspects of private property rights: first, that they more effectively internalize the external costs and benefits of the property owner's decisions and thereby provide incentives for efficient decisions, and second, that they increase the efficiency of the enforcement of bargains because private property owners are more readily made responsible than owners of communal or public property.

The third figure in the institutional pantheon is Douglass North.[35] He emphasized what had been implicit in the work

32. *See* TODARO, *supra* note 23, at 111.

33. R. H. Coase, *The Problem of Social* Cost, 3 J.L. & ECON. 1 (1960).

34. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

35. *See, e.g.*, NORTH & THOMAS, *supra* note 8; DOUGLASS C. NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) [hereinafter INSTITUTIONAL CHANGE]; DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC

of his predecessors: None of the wonderful results of contract and property rights or the advantages of private over commonly held property would materialize without institutions to enforce them. It is important to note that, particularly in North's later work, "institutions" includes formal and informal rules as well as organizations like courts or governments that are the more familiar referent of the term. Institutions, therefore, is a very wide category that includes virtually all the "rules of the game" for markets in a given society. Unfortunately, this broad definition of institutions has not survived the transition from academic theory to law and development practice, and the term "institutions" has come to mean the statutes, courts, judges, and lawyers of a country's formal legal system. It is in this narrower sense of the term that China's experience presents such a challenge, and, with apologies to Douglass North, we will use institutions and institutional economics in this sense in the next section.

C. *The Place of China in Contemporary Law and Development Theory*

I use four publications to measure the effect of the Chinese experience on law and development thinking. Although all four focus on issues where China has had remarkable success—the transition to a market economy, attracting foreign direct investment, and poverty reduction—three virtually ignore China, and none advocates a close examination of Chinese practice. Indeed, where one would expect to find intense curiosity about Chinese institutions, one finds instead scorn and criticism for their shortcomings. Even in the one publication that devotes significant attention to China, the author refuses to take seriously the possibility that China poses a counterexample to economic orthodoxy.

HISTORY (1981) [hereinafter STRUCTURE AND CHANGE]. Mancur Olson is another economist associated with institutional economics. *See* Mancur Olson, Jr., *Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor*, 10 J. ECON. PERSP. 3 (1996). Olson uses contract and property rights to explain why people in poor countries fail to "realize the largest gains from specialization and trade: They do not have the institutions that enforce contracts impartially, and so they lose most of the gains from those transactions . . . that require impartial third-party enforcement. They do not have institutions that make property rights secure over the long run, so they lose most of the gains from capital-intensive productions." *Id.* at 22.

The four publications are the World Bank's *World Development Report 1996: From Plan to Market*[36] and *World Development Report 2005: A Better Investment Climate for Everyone*,[37] Paul Collier's *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*,[38] and Kenneth W. Dam's *The Law-Growth Nexus: The Rule of Law and Economic Development*.[39] I chose *From Plan to Market* because it focused on transitional economies and because China is arguably the most successful such economy, and certainly the most successful large one. One would expect, therefore, a close examination of China's experience in a report specifically devoted to the transition from "plan to market." I chose *A Better Investment Climate* because it is devoted to increasing investment in developing countries, and China is by far the leading recipient of foreign direct investment in the developing world.[40] Again, one would expect China to figure substantially in any discussion of what makes a good investment climate in a developing country. I chose Collier's book partly because it reflects contemporary thinking in the development world but also because, as an academic economist and African specialist, Collier would present an example of the extent of China's importance to specialists of other regions. I chose Kenneth Dam's book for still different reasons. First, he is a lawyer, not an economist, and is without any direct ties to the World Bank (Collier was formerly at the Bank). The World Bank is influential in law and development thinking, but it does not have a monopoly on it.[41] Sec-

36. FROM PLAN TO MARKET, *supra* note 12.

37. WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE (2004) [hereinafter BETTER INVESTMENT CLIMATE].

38. PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT (2007).

39. DAM, *supra* note 3.

40. In 2007 China ranked third behind the United States and the United Kingdom in terms of inflows of foreign direct investment, ahead of the city-states of Hong Kong and Singapore, followed by the next developing country, Mexico. THE ECONOMIST, POCKET WORLD IN FIGURES 2008 EDITION 64 (2008).

41. The World Bank takes pride in its role in fostering increased knowledge about the process of development. In the 1990s, former President James Wolfensohn began to refer to the Bank as a "knowledge bank" engaged in the creation and dissemination of knowledge about the development process. *See* James Wolfensohn, Address at the World Bank/International Monetary Fund Annual Meeting (Oct. 1, 1996), *cited in* Galit Sarfaty,

ond, as a law professor with experience in American government, Dam has a perspective different from the Bank's economist-dominated approach. Finally, Dam expressly acknowledges the importance of China and devotes a chapter to the Chinese experience.

1. *From Plan to Market*

Despite its focus on transitional economies, the 1996 Report barely mentions China. It does, on the other hand, put property rights at the heart of the transition to a market economy, particularly in Chapter 3, "Property Rights and Enterprise Reform," which is largely devoted to the necessity of moving from public to private property systems—in other words, exactly what China has been doing for the last three decades. The experiences of countries from Ukraine to New Zealand in privatizing large enterprises, small firms, farms, commercial real estate, and housing are discussed in detail. China is significantly discussed once, in a "box"[42] on the famous township-village enterprises, or "TVEs," that are a model of property rights ambiguity and that I discuss in the next Part.[43] The box extols the TVEs' "extraordinary" performance and their substantial role in Chinese economic growth, noting that they are "neither state-owned in the classic sense nor privately owned in the capitalist sense."[44] It then gives five factors that have contributed to their success, but there is no attempt in the main text to develop the factors or to generalize from what the authors recognize as an extraordinary success in a world where extraordinary successes are not commonplace.[45]

Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank 37-38 (May 27, 2008) (unpublished manuscript, on file with The Law and Society Association).

42. FROM PLAN TO MARKET, *supra* note 12, at 51.

43. The Chinese box is one of seven. The others are "Innovative approaches to creditor-led restructuring in Hungary and Poland," "Coal restructuring in Ukraine," "Locking in the gains of enterprise reform in New Zealand," "Is environmental liability a serious barrier to privatization?", "Do's and Don'ts in privatizing natural monopolies," and "The pros and cons of restitution." FROM PLAN TO MARKET, *supra* note 12, at 46-65.

44. FROM PLAN TO MARKET, *supra* note 12, at 51.

45. The five factors are: kinship and implicit property rights; decentralization and financial discipline; competition for investment; market opportunities and rural savings; and links with the state-owned enterprise sector. *Id.* at 51.

The only other way China features in Chapter 3 is as a bad example. Remarkably, the authors discuss China as if the World Bank were a teacher scolding a promising but recalcitrant student.[46] A pair of examples will illustrate the tone. Near the beginning, the chapter discusses the general failure of state owned enterprises under communism in the 1960s and 1970s:

> Many countries—Hungary, Poland, the Soviet Union, and Yugoslavia in the past, China and Vietnam still today—tried to improve enterprise performance without resorting to privatization. "Reform socialism" . . . often yielded temporary improvements in productivity, but the Soviet Union and all the CEE countries eventually suffered reversals.[47]

And two pages later:

> China has not taken . . . dramatic steps to end the flow of subsidies to state-owned firms, but officials are increasingly concerned with their poor performance relative to the nonstate sector. . . . [T]he number of unprofitable state enterprises in China has been growing steadily, because these firms invest too much and earn too little. . . . [L]osses cannot be allowed to continue indefinitely; persistent money-losers must be forced to restructure or close.[48]

Such is the sum total of attention paid to China in "Property Rights and Enterprise Reform." China is not discussed at all in the eighteen-page section on "creating and allocating property rights" despite its almost two decades of doing precisely that with great success, at least if one defines "property rights" functionally to include informal institutions that can provide the security in investment that Demsetz would attribute to formal property rights in developed countries. It is thus astonish-

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46. Even the TVEs' success is followed by the warning that "the TVEs' limited and implicit property rights will need to be better defined and made more transferable." *Id.* at 51. Even if TVEs were not the final answer to the hoary corporations law issue of owner-management relations and agency slack, one would have thought that they would have been of greater interest than is implied by a negative closing line and their relegation to a "box" along with such weighty topics as "Locking in the gains of enterprise reform in New Zealand." *See id.* at 50.

47. FROM PLAN TO MARKET, *supra* note 12, at 45.

48. *Id.* at 46-47.

ing to read in the chapter conclusion that "The lessons of experience from enterprise reform are quite clear and applicable across the range of transition economies, from the Czech Republic to China."[49]

The World Bank authors are correct that state-owned firms remain a problem for China's economy. My point, however, is two-fold. As the authors note, the Chinese leaders were and are well aware of this problem but have decided to reform the state-owned enterprise (SOE) sector incrementally rather than opting for the "big bang" of immediate privatization that proved so disastrous in the former Soviet Union. Even more puzzling, given the Report's focus on property rights, is the almost total lack of interest in how China has managed to create effective markets without clear property rights. Since most developing countries do not have legally defined and judicially enforceable property rights, one would have thought that the World Bank would make a detailed inquiry into how China has improvised property-like institutions and made them perform the functions of control, stability, and accountability that Demsetz attributes to private property rights. Instead, the Report spends eighteen of twenty-two pages discussing considerably less successful attempts at reforms in Bulgaria and the Slovak Republic. One cannot help but conclude that describing the familiar approaches of the former Soviet bloc states, even if unsuccessful, was more comfortable for the authors than trying to understand China's unorthodox approach.

2. *A Better Investment Climate for Everyone*

In the almost ten years from the 1996 Report to the 2005 Report, China not only continued to grow, but also became the number three destination for foreign direct investment behind the United States and the United Kingdom and with more than triple the amount of foreign direct investment

49. *Id.* at 65. The lessons apparently are, first, that China must accelerate privatization because "state enterprises . . . lag nonstate firms in financial performance and productivity growth but still consume the lion's share of investment resources;" and second, that former members of the Soviet bloc "can learn from China about the importance . . . of unrestricted new entry, the unleashing of competitive forces, and farm restructuring."

(FDI) than the next developing country, Brazil.[50] One would expect, therefore, that the 2005 Report with its emphasis on investment climate would put China at the heart of its discussion. As the savvy reader undoubtedly has guessed, however, China barely appears. I concentrate on Chapter 4, "Stability and Security," because the Report in the initial "Overview" emphasizes "the security of property rights" and indicates that this is one of the keys to attracting FDI.[51]

The introduction of Chapter 4 is replete with the usual panegyrics on property rights:

- "Secure property rights link effort with reward, assuring all firms . . . that they will be able to reap the fruits of their investments;"
- "New evidence confirms how important secure property rights can be;"
- "[T]he more secure the rights, the faster the growth;" and
- "[T]he large number of [cross-national studies of hundreds of legal systems] all reaching the same conclusion led one commentator to observe that the link between secure property rights and growth has 'withstood an unusually large amount of scrutiny'."[52]

The quoted commentator, Philip Keefer,[53] reached his conclusion that the nexus between property rights and economic growth was virtually unassailable despite the fact that the Report trashed Chinese property rights and echoed the scolding tone of its 1996 predecessor in noting that China lacked "an ideal investment climate" because it "only recently gave constitutional recognition to private property rights" and enjoyed only a "rudimentary system of property rights."[54] It is as if the World Bank's focus on China's less than satisfactory legal system has rendered its remarkable growth invisible. I speculate in the Conclusion on how knowledgeable observers

50. THE ECONOMIST, *supra* note 40, at 64.

51. BETTER INVESTMENT CLIMATE, *supra* note 37, at 2.

52. *Id.* at 79-80.

53. Philip Keefer, *A Review of the Political Economy of Governance: From Property to Voice* 26 (World Bank Policy Research Working Paper Series 3315, 2004).

54. BETTER INVESTMENT CLIMATE, *supra* note 37, at 9. It is clear from the tone, however, that the Report's authors believed that rudimentary property rights are better than none.

could reach this conclusion, but let me now turn to the analysis of Chapter 4.

Again, China gets its own "box,"[55] which describes the almost twenty-year-old reform of rural land that led to a surge in agricultural productivity in the early 1980s.[56] After that China is virtually ignored. The nine other boxes cover a range of topics, from New York City police tactics, to Britain's opening of their conveyancing market to non-lawyers, to a retelling of Demsetz's story of the transition to private rights among Native Americans responding to higher fur prices. China is mentioned once in passing, as a place where the lack of intellectual property protection has led to the sale of poisoned meat.[57] Quite astonishingly, the words "China" and "Chinese" do not appear elsewhere in the chapter, not even in the figures and tables that supposedly demonstrate the necessity of property rights to FDI. If the amount of foreign direct investment, rather than cross-national surveys, is the metric for a country's successful development, China must have one of the best investment climates among developing countries. However, China was either invisible or irrelevant to the world's leading development agency.

3. *The Bottom Billion*

China is again ignored in the 2007 book *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It?* by Paul Collier, the former director of development research at the World Bank. Collier mentions China five times, including once to note its veto power in the UN Security Council and once to note that the best thing to happen to China in recent history was Mao's death,[58] which allowed China to reverse his disastrous policies (there is no mention of what the resulting policies were, just that they were not Mao's). The only substantive role for China in the book is negative—for the "bottom billion" to grow, Chinese and other

55. *Id.* at 80.

56. As economist Yingyi Qian puts it, "economists are generally comfortable with the Chinese agricultural reform because it fits their models of the world." Yingyi Qian, *How Reform Worked in China*, *in* IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH 297, 301 (Dani Rodrik ed., 2003).

57. BETTER INVESTMENT CLIMATE, *supra* note 37, at 85 in Box 4.7.

58. COLLIER, *supra* note 38, at 66.

"Asian" exports must be controlled so that the poorest countries can get their share,[59] again without any mention of why Chinese and Asian exports dominate world markets.

It is Collier's last reference to China, however, that is most revealing. In his discussion of the difficulties of democracy in ethnically diverse and poor countries, he raises the question of whether "autocracy" is the answer. He states, "The astonishing success of China glows like a beacon to some of the autocrats of bottom-billion societies, but it is a radically misleading comparison. China is an example of a homogeneous autocracy, whereas many bottom-billion societies are characterized by ethnically diverse autocracies."[60] End of story: China is an 1) ethnically homogeneous 2) autocracy and, therefore, irrelevant.

There are several ways to approach Collier's treatment of China. First, of course China is an autocracy—but should that be the end of the inquiry? Even if he is, implausibly, confident that all the countries of his bottom billion will always be democracies, shouldn't Collier be interested in China's record of eliminating poverty? In August 2008, the World Bank estimated that China had reduced the number of its citizens in poverty from 835 million in 1981 to 207 million in 2005. In the same period, despite a decline in the rate of poverty, the number of people in poverty in India increased from 420 to 455 million. According to the Bank, total global poverty dropped from 1.9 to 1.4 billion people between 1981 and 2005, meaning that the global decline is almost *entirely* attributable to China.[61] It seems astonishing that a respected economist writing about poverty reduction could dismiss this accomplishment with simply a casual reference to authoritarianism. For one thing, it is quite unclear that what made China grow during this period is even related to its autocratic political system, much less dependent on it as Collier seems to believe. Who is to say that the policies that contributed to Chinese growth, including its institutional safeguards for economic in-

59. *Id.* at 167 ("For the bottom billion to break into [export] markets, they need temporary protection *from* Asia.").

60. *Id.* at 49.

61. *See World Bank Finds More People Live in Steep Poverty*, N.Y. TIMES, Aug. 26, 2008, at A9 (reporting statistics for citizens in poverty in China and India between 1981 and 2005); Ravallion Q&A, *supra* note 2, at Question 16 (discussing China's success in combating poverty between 1981 and 2005).

terests, might not be of relevance to developing countries with a range of political systems? But Collier does not bother to ask.

His response might be that China's ethnic homogeneity makes it inapplicable to the rest of the developing world. If so, this position is equally troubling, even if we put aside the vital issue of whether it is only ethnic diversity that causes social conflict and inhibits growth.[62] It is troubling because Collier gives absolutely no empirical basis for his claim that China is more homogenous than most developing countries. To take two examples from Africa, are Tibetans or Mongolians more like Han Chinese than the Ibo are like the Yoruba or the Luo like the Masai? Of course, official minorities like Tibetans and Mongolians comprise a relatively small percentage of the Chinese population, so the real question may be whether the Cantonese are more like residents of Sichuan or Beijing than African ethnic groups are like each other. This is not the place to settle that question; we are better occupied with why Collier does not bother to ask, assuming instead that Chinese are virtually all alike. If he had asked, perhaps he would have become curious about what political, cultural, and social policies have succeeded in making a quite heterogeneous population appear to him to be homogeneous. Perhaps he would have gone even further and speculated on the relevance of such history to societies like Nigeria and Kenya. Instead, he appears not the slightest bit curious about China, assuming, perhaps, that it is unique in some deep way that makes its experience of little relevance to those interested in how countries grow.

4. *The Law-Growth Nexus*

Unlike the previous three publications, Kenneth Dam tackles China directly and in depth, recognizing that Chinese growth has occurred without much in the way of property or contract rights and concluding his book with a chapter entitled "China as a Test Case."[63] That alone would make the book worth examining, but there are two additional reasons to

62. Indeed, Collier himself notes that although "newspaper accounts" may make it seem as if "all civil war is based in ethnic strife, . . . [s]tatistically, there is not much evident of a relationship between ethnic diversity and proneness to civil war." COLLIER, *supra* note 38, at 25.

63. DAM, *supra* note 3, at 233.

do so. First, he is not an expert on Asia, so he cannot be accused of special pleading.[64] Second, his conclusion represents the popular view that China may have done all right without law up to the present, but is likely to crash if it does not quickly create an effective legal system.[65]

Dam's recognition that China has grown rapidly without law is important, but he refuses to take the logical next step and conclude that the Chinese experience should lead to reconsideration of the conventional wisdom of law and development. Instead of urging the study of Chinese substitute institutions and their potential relevance to other developing countries, he emphasizes China's efforts to build a legal system as it has grown economically—what he refers to as "filling in the chinks and gaps in the legal infrastructure."[66] From this observation, he concludes that China's "guided evolution" toward the rule of law has reached an impasse where vested interests, such as those of the SOEs, resist further reforms. He notes that the interest of Chinese leaders and thinkers in institutional economics suggests that "they know that their institutions are not sufficiently strong for indefinite sustained growth."[67]

In Dam's last paragraph, he concludes that not too much should be made of China's story:

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64. Dam is the Max Pam Professor Emeritus of American and Foreign Law at the University of Chicago and a senior fellow at the Brookings Institution. He served as deputy secretary of the treasury from 2001 to 2003 and deputy secretary of state from 1982 to 1985. This is from the dust jacket of DAM, *supra* note 3.

65. *Id.* at 274, 277. The gist of this idea is that although China may have developed so far without law, it is about to reach a point where further development will stall without effective legal reforms. In reaching this conclusion, Dam does not rely on Chinese experience alone. He cites John Coffee for the proposition that securities markets in the United States and United Kingdom developed initially without an adequate legal structure to protect the property rights of minority share holders and other vulnerable stake holders. In Coffee's words: "there is little evidence that strong legal rules encouraged the development of either the New York or London Stock Exchanges." John Coffee, *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J 1, 80 (2001-2002).

66. DAM, *supra* note 3, at 274.

67. *Id.* at 275.

> It is certainly too early to accept the notion that recent Chinese experience is a counterexample to the need for a focus on institutions in the developing world and, indeed, for a rule of law in China itself. Rather the Chinese experience is consistent with [the] view that considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions. While a definitive conclusion will not be able to be drawn for several decades, it is nonetheless clear that little thus far in the Chinese experience leads to the conclusion that rule of law issues are not important in economic development.[68]

It is clear that Dam takes China seriously. Why else would he end his book with a chapter entitled "China as a Test Case"? When push comes to shove and one must make that closing statement of belief, however, the pull of conventional wisdom and the masses of survey data[69] overwhelm the empirical reality of thirty years of remarkable growth without enforceable legal rights.[70]

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68. *Id.* at 277.

69. Like the 1996 and 2005 Development Report authors, Dam relies extensively on World Bank-sponsored cross-national studies, but he does so with a much more critical eye. Addressing these data on his penultimate page, Dam says: "The econometric evidence . . . showing that causation runs from institutions to growth rather than vice versa may be interpreted to say that *on balance* the causation runs from institutions to growth but that to some extent increasing wealth helps to build institutions." *Id.* at 276.

70. The economic press is also perplexed by Chinese economic growth. THE ECONOMIST, for example, in a celebratory article on the 2007 Property Law first asserted that "Clearer, enforceable property rights are essential if China's fantastic 30-year boom is to continue" and then warned that "This latest law . . . will not bring the full property-rights revolution China's development demands." *Property Rights in China: China's Next Revolution*, THE ECONOMIST, March 8, 2007, at 11. What is remarkable is that the author could in a single sentence both remind the reader of China's three decades of growth without property rights and then repeat the truism that property rights are essential to growth. The FINANCIAL TIMES contained the contradiction in consecutive sentences: "Undeniably, China's property market has been in need of a clear legal framework since . . . the early 1980s. In recent years, the astronomical growth of China's economy has resulted in a boom in real estate developments all across the country." Again, the author notes the need for clear rights while simultaneously noting a "boom" without

Dam is correct that nothing in the Chinese experience is inconsistent with the view that idealized rule of law institutions are required to reach high levels of per capita wealth. It is equally correct that the Chinese experience is consistent with the opposite proposition. The Asian financial crisis of the late 1990s has often been cited as evidence that high-flying Asian economies can only go so high before their defective legal systems bring them crashing down.[71] Certainly, legal and regulatory institutions failed to prevent or contain that crisis, and some countries subsequently initiated significant legal reforms.[72] The nature, depth, and permanence of those reforms, however, are in doubt,[73] and Dam recognizes that there is also evidence that financial markets can become large and complex without sophisticated legal protection of participants.[74] In this context it is important to note the almost total collapse of Western financial systems in late 2008. These are precisely the legal and regulatory institutions that Dam and others had urged China to replicate so that it could eventually emerge as a fully developed economy. One can surmise that Chinese leaders must be pleased that they did not take *this* particular bit of Western advice.

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them. Ashley Howlett, *Only Implementation Will Reveal Impact of New Property Law*, FIN. TIMES, Aug. 1, 2007, at 11.

71. Dam recites "one view" of the crisis as "the Asian Tigers . . . achieved very rapid growth despite weak institutions so long as they were still at a relatively low level of economic development, but that they failed to invest their growing incomes in improvement of institutions and eventually the failure to do so led to the Asian financial crisis." DAM, *supra* note 3, at 277. Milhaupt and Pistor describe the burst of legal reform in South Korea at the time: "The weak institutional structure underpinning Korea's *chaebol*-led economic success was exposed in the 1997 Asian financial crisis. Korea in many respects became the poster child for the emphasis of the so-called Washington Consensus on corporate and bankruptcy reform, transparency, capital market development, and best practices in corporate governance." CURTIS J. MILHAUPT AND KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 119 (2008) [hereinafter Milhaupt and Pistor].

72. Milhaupt and Pistor, *supra* note 71, at 119-120.

73. *See generally* Milhaupt and Pistor, *supra* note 71, at 109-124 (tracing the mixed fate of such reforms in Korea).

74. DAM, *supra* note 3, at 274 (citing John Coffee, *The Rise of Dispersed Ownership: The Role of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 80 (2001-2002)).

In sum, law and development theorists can be certain about very little, but one observation that remains irrefutable is that China demonstrates beyond peradventure that substantial economic growth and dramatic reductions in poverty are possible without legal and regulatory institutions. And yet Dam, Collier, the World Bank, and other law and development theorists and practitioners remain unwilling to accept the idea that China provides the development community with an example worthy of serious study.

III. The Role of Property Rights in Chinese Growth

Before I look at how the Chinese were able to create and maintain effective markets without effective legal institutions, I will assess the performance of China's legal system during the past three decades of economic growth, especially with respect to property rights.

A. *Was the Chinese Legal System Really That Bad?*

Note the tense of the title for this section. Our question is not whether the Chinese legal system in 2009 plays a constructive role in economic growth; it is whether the Chinese legal system played a substantial role in China's rise from a desperately poor to a lower-middle-income country over the last thirty years.

To answer this question, we need a knowledgeable scholar or practitioner who claims that the Chinese legal system over these three decades was not really *that* bad. Our search might begin with Chinese scholars but for two problems. First, I know of no Chinese scholar who has addressed the historical role of courts in generating economic growth over this period. Second, it is not so easy to find Chinese legal scholars or practitioners willing to praise the effectiveness of contemporary courts, much less ones willing to make such statements about the past.[75]

75. The advocates for the new Property Law, for example, all stressed the shortcomings of property law as of 2007 and gave no reason to believe that they considered the law to have been better twenty years earlier. Legal academics who were less enthusiastic about the draft statute were often outright negative. When one of the drafters asserted that it was the legal obligation of all urban residents whose homes were about to be demolished to follow the law and vacate their premises promptly, a younger law professor coun-

That leaves us with foreign scholars. Here we have a number of sources, for although the general law and development literature may not pay a lot of attention to Chinese law, those writing about Chinese law have paid attention to law and development. While not all phrase it quite so categorically, the consensus view is captured well in an article co-authored by a law professor, an economist, and a political scientist: "It is impossible to make the case that formal legal institutions have contributed in an important way to China's remarkable economic success."[76] Their reasons are obvious. When reform began in the late 1970s, China's legal institutions barely existed. The courts, the bar, and legal education had been decimated by the Cultural Revolution. Even if there had been legal institutions, there was little law to enforce, especially in terms of private property rights, which did not receive comprehensive statutory protection until the Property Law of 2007.[77]

Even after the government started promulgating law-like rules and regulations in the 1980s, legal entitlements to important economic assets remained sketchy at best. One leading scholar of Chinese law characterized the situation in 1999 as follows: "A striking feature of economic reform . . . is the ambiguity of rights over the acquisition, management, and disposition of property. Chinese economic reforms have been successful to date despite the absence of any systematic attempt to

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tered that such an obligation existed only if the courts are "able to speak for ordinary people and to uphold justice," which, he asserted, they are not: "[I]t is painfully obvious that courts serve the developers and the government" and are "nothing but [corrupt] weapons of the government." (My translation.) *See* Chen Yongmiao, Remarks made at Discussion Forum of the Chongqing Nail House Incident, Beijing University (April 7, 2007) (transcript of Chen's remarks is on file with the author).

76. Donald Clarke et al., *The Role of Law in China's Economic Development* 51 (The George Washington University Law School Public Law and Legal Theory Working Paper No. 187), *available at* http://ssrn.com/abstract=878672.

77. Of course private property has always existed in China. One could not take a neighbor's bicycle with impunity even at the height of the Cultural Revolution. Until a 1999 amendment of the Constitution, however, private property was subordinated to public property, and it was not until the Property Law of 2007 that this formal equality was directly applicable to society through the courts. *See* STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 183 (1999) (explaining the 1999 amendment). *See also* LONG MARCH, *infra* note 85, at 89 (describing the non-justiciability of constitutional norms in ordinary courts).

clarify what economists call . . . 'property rights.'"[78] Even now, after more than two decades of vigorous legal reform, the judiciary lacks a fundamental prerequisite for the protection of property rights, the power to enforce its judgments. Chinese courts are notorious for "local protectionism," their refusal to rule against or to enforce economically threatening judgments against entities within their own locality. They are, if anything, even less inclined to go against politically strong entities.[79] The Party-state has the formal power to intervene in specific cases and it does not hesitate to use it when important interests are at stake. Thus, Chinese courts are unlikely to protect private property against the state, the Party, or private entities with close ties to them even today, much less during the 1980s and 1990s.

There is one partial exception to this dreary recitation of the flaws of China's legal system, Randal Peerenboom's *China Modernizes: Threat to the West or Model for the Rest?*, and it is worth looking at this more positive evaluation in some detail. As his title implies, Peerenboom's ambition is to propose China as a model for other developing countries. He readily admits China's shortcomings, agreeing for example that legal fragmentation results in "a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, explanations, and so forth, all claiming to be normatively binding."[80] But Peerenboom is more interested in urging the world to recognize China's achievements, and to put its shortcomings into the context of a country that Peerenboom reminds us is still poor.

He begins with the point that China performs fairly well on cross-national good governance and rule of law surveys when compared to other lower-middle income countries, which, he stresses, is the only appropriate standard.[81] He also

78. LUBMAN, *supra* note 77, at 116-17.

79. Benjamin L. Liebman, *China's Courts: Restricted Reform*, *in* CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 66, 72-73 (Donald Clarke, ed., 2007).

80. Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315, 333 (1999).

81. Peerenboom stresses that to compare China to developed countries or "the utopian, perfectionist standards of human rights activists" is "like comparing a piano to a duck." CHINA MODERNIZES, *supra* note 4, at 198-99.

notes that legal institutions perform better in some fields than others, and that commercial law is often among the strongest of Chinese legal regimes. Courts also vary by region, and those in richer provinces and larger cities tend to be much better than those in poor or rural areas.[82]

After making these relatively positive points, Peerenboom's evaluation of the quality of the Chinese legal system becomes less robust, especially for our purposes. Consistent with his effort to defend the oft-maligned Chinese legal system, he concentrates on those areas of Chinese law that are frequently criticized. For example, he defends limitations on judicial independence and controversial modes of criminal control as appropriate to China's current circumstances.[83] When it comes to specific areas of economic law like property or contract rights, however, he takes what can be interpreted as a middle line:

> The government has generally refrained from seizing the assets of companies, although many government agencies impose a variety of approved and unapproved fees that amount in some cases to an informal taking. In contrast, the rush to modernize and generate economic growth has resulted in widespread government taking of land and the relocation of citizens in both the countryside and in cities. As in other countries, property rights are protected both through the formal legal system and informal mechanisms. While the system is far from perfect, property rights may be enforced in court.[84]

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82. LONG MARCH, *infra* note 85, at 483-84.

83. CHINA MODERNIZES, *supra* note 4, at 212-16.

84. *Id.* at 75. It is unclear what Peerenboom means here by his reference to the judicial enforcement of property rights. Since he later states that courts cannot be relied on to protect citizens in "conflicts with other state organs," he may be referring to the courts' willingness to protect property rights from theft by other private citizens or he may simply be stating what the legal rules state should be the case. If the latter, of course, it is of little relevance in practice, but if the former, it reminds one that China has largely succeeded in protecting property rights from common theft, rebellion, brigandage, and other events that plague property owners in many developing countries. Since North and Thomas cite the suppression of piracy as one example of the vindication of property rights that led to the rise of the West, this aspect of Chinese law is worthy of note, but it is not the aspect of prop-

This appraisal is consistent with, although perhaps a bit less positive than, comments in Peerenboom's earlier book on the rule of law in China. There he seemed to imply that the legal system contributed to increasing foreign direct investment in the second decade of reforms,[85] before concluding that "China's legal system undeniably still falls far short of any reasonable standards for rule of law."[86]

Peerenboom's opinion on property rights enforcement as such over the past thirty years is hard to pin down because he is analyzing the contemporary state of the Chinese legal system. To the extent that he deals with the issue, he is more positive than most scholars, but hardly effusive, and his closing remarks in *China Modernizes* are not optimistic: "The judiciary lacks adequate competence, authority, and independence to handle many of the controversial economic, social, and political disputes now being funneled into the courts . . . especially when they involve conflicts with other state organs."[87] Since two of the irreducible criteria for any version of the rule of law are judicial enforcement of legal rights against the powerful and the prevention of illegal governmental action, it seems safe to continue on the assumption that it was not primarily legally-defined and enforced property rights that protected economic interests in China during the last three decades of growth.

B. *How China Protected Property Interests (or Not)*

Legal enforcement of formal property rights, though, is not the only way to protect an economic asset. It is useful to revisit Demsetz at this point to help us focus on the fundamental issue:

> Property rights . . . help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen

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erty rights protection that concerns most economists and law and development theorists today. *See* NORTH & THOMAS, *supra* note 8, at 3-4.

85. *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW 462-475 (2002) [hereinafter LONG MARCH].

86. *Id.* at 464.

87. CHINA MODERNIZES, *supra* note 4, at 226-27.

> to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights.[88]

As we have seen, China did not possess legally defined property rights enforceable in the courts, and yet some social processes did enable economic actors, whether they were Chinese farmers or multinational corporations, to "form those expectations" on which they could rely to "prevent others from interfering with [their] actions." A general description of what those processes might have been is beyond the scope of this article, but the following may give the reader a sense of how economic interests have been treated in two important sectors over this period of sustained growth. I begin with township and village enterprises (TVEs), the "growth engine" of reform in China until the 1990s[89] and "Exhibit A" in most commentators' discussion of China's ambiguous property rights,[90] and then discuss the conversion of agricultural land to urban uses.

1. *Ambiguities of Ownership in TVEs*

Despite the diversity of TVE forms, a few generalizations are possible. First, when they emerged in the 1980s from the

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88. Demsetz, *supra* note 34, at 347. Like North, Demsetz included in his definition of property rights the customs and mores of a society. Unlike North, however, he focused on legally created and enforced property rights, and most of those who have applied his insights have shared this focus. Important exceptions include Ellickson, Bernstein, etc., but they have had relatively little impact on law and development thinking.

89. *See* Qian, *supra* note 56, at 306. Naughton calls TVEs the "'motor' for the entire transition process." NAUGHTON, *supra* note 13, at 275. *See generally id.* at 271-94; CHIH-JOU JAY CHEN, TRANSFORMING RURAL CHINA: HOW LOCAL INSTITUTIONS SHAPE PROPERTY RIGHTS IN CHINA (2004); Jean C. Oi & Andrew G. Walder, *Property Rights in the Chinese Economy: Contours of the Process of Change*, *in* PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA 1, 1-27 (Jean C. Oi & Andrew G. Walder eds., 1999); JEAN C. OI, RURAL CHINA TAKES OFF: INSTITUTIONAL FOUNDATIONS OF ECONOMIC REFORM (1999); and Brett H. McDonnell, *Lessons from the Rise and (Possible) Fall of Township-Village Enterprises*, 45 WM. & MARY L. REV. 953 (2004). Except for economists Naughton and Qian and law professor McDonnell, none of the above authors are either legal scholars or economists. For an analysis of the significance of this disciplinary difference, *see* CHEN, *supra* note 89, at 8-17.

90. Naughton notes that some commentators refer to them as "fuzzy." NAUGHTON, *supra* note 3, at 121-22.

communes of Maoist days, TVEs represented a novel form of ownership distinct from both the state-owned enterprises that dominated pre-reform China and the private firms that dominate the contemporary economy.[91] They were nominally owned by the residents of the village or township in which they were located, but controlled by the local government and party structure, which in turn delegated day-to-day operation to managers. Accountability did not run to the owners. Local officials' career prospects remained in the hands of their superiors in the state apparatus, not the local residents who were the ostensible owners—a conflict of interest that must have meant that the residents or owners did not receive all the residual benefits to which they were in some formal sense entitled. Nonetheless, the community benefited substantially from the existence of the TVEs. Most employees were residents, and most revenues went toward the governmental provision of public goods such as schools, health care, and infrastructure. The community was not in control, however, either through some form of shareholding or elections.

It is difficult to generalize about TVEs beyond this basic structure,[92] but Chih-jou Jay Chen's study of property rights in TVEs in two villages, Shuang in Jiangsu Province and Hancun in Fujian Province, can give us a sense of the almost total irrelevance of formal law in the relationships among the various stakeholders.[93] Shuang's TVEs were dominated by Communist Party cadres, who discouraged private enterprise even where it was legally allowed. Chen tells the story of two private

91. By the mid-1990s most TVEs themselves had privatized. *See* NAUGHTON, *supra* note 3, at 286-92.

92. Oi and Walder portray the evolution of TVEs as the incremental devolution of specific rights from higher government agencies to lower government agencies and eventually from government agencies to private entities or individuals. The starting point was the full public ownership and control of the communes and the end point is full privatization. The authors warn, however, against generalization and stress the variation within and among the forms. Oi & Walder, *supra* note 89, at 7-10. Naughton argues that their diversity accommodated growth: "A simple but important aspect of TVE development was that there was no single organizational model. . . . As a result of this flexibility, TVEs were able to adapt to a broad range of opportunities [and] a variety of different regional 'models' of rural industrialization grew up, each plausibly suited to a different set of economic conditions." NAUGHTON, *supra* note 13, at 280-81.

93. *See* CHEN, *supra* note 89.

entrepreneurs being called in by the village party secretary and told, "There is no room for private business in our socialist territory. However, there is plenty of good stuff for collective entrepreneurs here."[94] The entrepreneurs took the hint and got rich off the opportunities available to cadre-entrepreneurs in the 1980s and 1990s.[95]

Shuang's TVEs were eventually formally privatized at the end of the 1990s, but hardly as the rules of the market would dictate: "The transfer of ownership and the flow of money passed only through the hands of the moneyed elite—between the local officials and the directors."[96] In other words, the privatization of the wealth of the TVEs proceeded in the same manner as had the accumulation of wealth, through webs of "incestuous relationships" created by political power, local social norms, kinship, and preexisting bureaucratic ties. Despite this plunder by party-state cadres and their cronies, Shuang prospered, and although the average villager may not have been receiving dividend checks and proxy statements, he likely was employed and sharing in the area's new schools, transportation infrastructure, and general prosperity.

Meanwhile, in Fujian Province, a few hundred miles down the Chinese coast, Hancun village was also prospering, but under very different circumstances. Unlike Shuang, where the party structure was strong and cadres dominated entry into the new market economy, Hancun had a history of private commercial activity that survived even in the days of the command economy. As a result, the economy was dominated by private firms, but for reasons that varied over the reform period, these family firms usually "wore red caps"—that is, they were registered as collective enterprises and were thus, formally, collectively owned TVEs. In return for the protection that the firms received from collective status, they paid 3-5% of sales to the township government.[97] Eventually the local government became so weak in the face of the private sector that the party persuaded one of Hancun's most successful entrepreneurs, a

94. CHEN, *supra* note 89, at 112.

95. The shifting between collective and private formal identities is described by Naughton as well. NAUGHTON, *supra* note 3, at 280-81, 286-92.

96. CHEN, *supra* note 89, at 122.

97. *Id.* at 162.

man who had hitherto expressed nothing but disdain for the party, to become party secretary of the village.[98]

In these chapters, Chen presents two dramatically different property structures. In Shuang, an economy dominated by nominally privatized TVEs was in substance in the hands of sitting and former government and party officials. In Hancun, the government's role was limited to collecting licensing fees in return for the necessary "red cap." This description is incomplete, omitting many of the details of Chen's colorful accounts of political and business intrigue, but several observations can be made that are of central importance for our purposes. First, property rights in both places were ambiguous and judicially unenforceable, and yet both places enjoyed spectacular economic growth. Second, the state played a role that was at times parasitic and at times fundamental to the enterprises' successes, but the state did not do what economists argue every state will do if not prevented by formal property rights: It did not steal the wealth of successful businesses. State officials were not necessarily motivated by a desire to serve the commonweal, but more likely because political and social structures—not legal ones—made it undesirable, impossible, and unnecessary for the state to kill the golden goose that was doing so well for the local economy, the local society, and ultimately local government and party bureaucrats.

Of course, to recognize the success of these arrangements is not to assert that Shuang and Hancun enjoyed the best of all possible worlds. Perhaps they would have done even better and delivered even more benefits associated with development had they enjoyed a legal system that law and development practitioners could embrace. There is literally no way to disprove this proposition, but when compared with the poverty of pre-reform China or of many contemporary developing countries, these ad hoc property regimes look pretty good, and not only from the perspective of immediately delivering development's benefits. They also, as economist Barry Naughton explains, prepared the ground for further growth:

> The precise distribution of property rights . . . was negotiated in a local, face-to-face process. The complexity of these arrangements has led some to de-

98. *Id.* at 172-77.

> scribe TVE property rights as "fuzzy." In fact, the property rights were able to accommodate numerous stakeholders flexibly, adapt to an enormous range of situations, and often produce effective and entrepreneurial organizations. It is ironic that publicly owned entities . . . played a crucial role in opening up the Chinese system to market competition and further economic reform.[99]

But economic growth is not the only result that one might wish that a legal system or property rights in particular would produce. In the next section, we will briefly examine an instance where, although again contributing to economic growth, weak property rights leave a less pleasant taste in one's mouth.

2. *The Transfer of Agricultural Land to Urban Use*

One of the pressing realities of Chinese growth is urbanization. Over the last three decades an estimated 150 million rural residents have moved to cities,[100] and estimates of future migration run from another 500[101] to 850[102] million in the next three decades. To accommodate this shift, China must convert large amounts of agricultural land to new uses, and it must frequently do so against the will of those who have built their lives and livelihoods on their entitlement to land and homes. In this section we look at the theory and practice of converting agricultural land to urban uses in China.[103]

Land in China is legally classified as urban or rural.[104] Urban land is owned by the state, that is, by the whole people as

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99. NAUGHTON, *supra* note 13, at 121-22.

100. Peter Hessler, *The Wonder Years*, THE NEW YORKER, Mar. 31, 2008, at 68.

101. Wei Pan, cited in Eva Pils, *Peasants' Struggle for Land Use in China*, unpublished paper, on file with author.

102. Jiang Gaoming, *Toward Sustainable Urbanisation in China*, CHINADIALOGUE, Sept. 6, 2006 http://www.chinadialogue.net/article/show/single/en/348.

103. Land law in China is fluid and fragmented, and this section provides only an overview as it relates to the issues on point herein. For a more comprehensive treatment, see PATRICK A. RANDOLPH, JR. & LOU JIANBO, CHINESE REAL ESTATE LAW (2000).

104. People are also either urban or rural, and urban residents receive a wide range of services and privileges not granted to rural residents. As a result, urban status is highly sought after, and rural Chinese residing illegally

represented by the national government. Rural land is owned by the relevant collective in a way legally similar to the ownership of TVEs. Individuals cannot own land, but households can own their homes and usufruct rights to plots of collectively owned land. Granting individual households control of land was one of the first steps in China's turn to a market economy and produced an immediate and substantial increase in agricultural production. These reforms have been followed by further incremental steps aimed at the commercialization of agricultural land, and while such measures may eventually create a commercial market in rural land-use rights, the sale of rural land rights for non-agricultural uses remains severely limited.[105] For collectively owned rural land to be used for urban purposes, it must first be converted to state owned urban land through the "requisitioning" process, after which the city can sell use rights at market prices.

Requisitioning must satisfy certain legal criteria. It must be in the public interest; those affected must be consulted; and compensation must be paid.[106] The requirements of public interest and consultation are similar to American doctrine,[107] but the measure of compensation departs substan-

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in urban areas have the legal and social status of second-class citizens in a way reminiscent of illegal immigrants in the United States.

105. There are informal markets in rental and "sales" of rural land and houses (referred to as "small property") for use as second homes for urban residents, including foreigners, but these are not legally recognized. Xiaochan Quanfang: Baixing Xi Zhengfu You [Small Property Houses: The People Are Happy; The Government Is Worried], RADIO FREE ASIA, Jun. 23, 2007, http://www.rfa.org/mandarin/yataibaodao/fang-20070623.html. For ownership by foreigners, *see* Hessler, *supra* note 100 at 68.

106. RANDOLPH & LOU, *supra* note 103, at 73, 84. For a detailed explication of these procedures in a concrete case, see Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, 244-59 (2005).

107. The United States Supreme Court has interpreted "public use" to include the involuntary transfer of land from one private party to another for the purpose of economic development, so it would seem appropriate by American standards to interpret the requisitioning of land to satisfy China's urgent need for land for housing, industry, and commerce to be in the public interest. Of course for an exercise of eminent domain to meet the public use criterion, an American government must demonstrate that it has followed an open and competent planning process that provides adequate opportunities for stakeholders to counter government claims of necessity, scale, etc., which seems at least the doctrinal equivalent of the Chinese requirement of consultative procedures. *See* Kelo v. City of New London, 545

tially from both American practice and law and development orthodoxy. First, it is unclear who should receive the compensation—the collective that owns the land or the individual households who own the rights to use it. The law seems to choose the former and rely on the collective government to ensure that individual households are in turn compensated. Second, the compensation award is based on the discounted value of the usufruct right for agricultural use.[108] Since the duration of the usufruct right was fifteen years for much of this period, the amount became the discounted value of fifteen years of crops.

The problem with the requisitioning process should be obvious: the total disconnect with market value. Since rural land cannot be readily sold for non-agricultural use, there is no existing market, but one can be assured that, were sales possible, a market would immediately develop and likely produce a price close to that which the local government receives when it transfers the land to developers. Instead, the local government gets the land at a small fraction of its worth and can either pass those savings on to the developer or retain the funds for the local municipal budget. Either result fails to realize the incentives for the efficient use of land that Coase and Demsetz argued would be possible under a system of private land ownership.

With this legal framework as background, I turn to the requisition process in practice. Here there are immediate challenges in accessing information. Generalizing about the law in action is difficult in any society, but China presents particular difficulties. First, land-use conflicts are as politically charged in China as they are in the United States, but with the added dimension that cronyism, opaque processes, and outright criminality are even more prevalent in Chinese than in American local governments. Then there is money, and the overwhelming temptation to obscure its flow. Chinese local governments derive a substantial portion of their revenue from buying low off the urban land market and selling high

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U.S. 469 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

108. In addition to this compensation for the land, additional amounts were due for buildings (homes), fixtures, other improvements, the value of existing crops not yet harvested, and a resettlement allowance.

into it.[109] Without the funds realized through these deals, local governments would have a very difficult time providing the schools, hospitals, public services, and physical infrastructure that are their responsibility. When this is compounded by official venality, the likelihood of transparency in the process further declines. Finally, as we shall see, those occasional moments of revelation in American land use administration provided by judicial scrutiny are virtually unheard of in China. The importance of the revenue to the local governments that pay judicial salaries, the likelihood of official corruption, and the intense moral drama that surrounds battles over farmland and homes mean that courts often simply refuse to entertain litigation arising from land disputes, and that when they do, no tell-all revelations emerge.[110]

We are fortunate, however, in this instance, because one dispute arising from the requisitioning of land near the Sichuan city of Zigong has been well documented.[111] There is no need for this Article to get into the details of the case, but an overview of the process in Zigong will illustrate how far actual practice falls short of the legal framework described above.

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109. *See* RANDOLPH & LOU, *supra* note 103, at 83; Xin He, *Administrative Law as a Mechanism for Political Control in China*, *in* CONSTITUTIONALISM AND JUDICIAL POWER IN CHINA (Stéphanie Balme ed., forthcoming Sept. 2009) (manuscript at 8-9, on file with the author).

110. After reviewing the institutional and legal framework of land development, Xin He concludes that there are virtually no legal safeguards even in theory until late in the process and that "[a] court seeking to step in at this late stage would only find itself ignored and, if it presses the issue, politically embarrassed. That is why many local courts refused to take such cases. Indeed, the Supreme People's Court, after some hesitation, issued a decision that makes it easier for local courts to refuse to hear . . . cases." Xin, *supra* note 109, at 10. *See also* Pils, *supra* note 106, at 259-73 (providing a concrete example that occurred in Sichuan province).

111. *See* Pils, *supra* note 106. While there is no way to guarantee the representativeness of the Zigong case and outside observers usually hear only the horror stories, most reports indicate that Zigong is typical of the general contours of such disputes. *See, e.g.*, Sarah Jackson-Han, *Three Injured, Four Detained in China Clash over Suspected Graft*, RADIO FREE ASIA, Oct. 26, 2007, http://www.rfa.org/english/news/politics/china_clash-20071026.html (describing a case in Guangdong in which collective land had been rented for factory sites at RMB 10,000/mu but villagers received only RMB 2,000/mu).

Even if one assumes that demographic trends render virtually any addition to urban land in the public interest, procedural requirements remain, and the Zigong consultation process appears to have begun and ended with secret meetings between city officials and village leaders. None of the public notifications or consultations took place, and the written "agreements" of the villagers to both the requisition and the terms of compensation and resettlement were forged, backdated, or both. In other words, the procedural safeguards designed both to protect rural residents' interests and to improve the accuracy and efficiency of the requisitioning process were ignored.

Compensation was similarly deficient. The villages surrounding Zigong were relatively prosperous, but their residents nonetheless initially welcomed the promise of urban residency status for the same reasons that virtually all rural residents do—urban residents receive a range of services denied rural residents, and factory jobs are considerably easier and better paying than farm work.[112] These villagers, however, ended up substantially worse off. Their demolished homes were valued as rural homes, even when they were demolished after the land had been reclassified as urban, making the purchase of suitable urban housing impossible. Many remain in substandard temporary housing; others were reportedly made homeless. Compensation for the farmland, calculated as it was for fifteen years of crops, was destined to be grossly inadequate from the beginning, but as it turned out, the amounts were irrelevant because the funds went not to the farmers holding the land use rights, but to the collective owners. That might make sense legally, but in reality the collectives were controlled by the same village leaders who colluded with the development agencies from the beginning. It is not surprising, therefore, that the amounts reaching individual households were piteous indeed. In the course of the over a decade that the requisitioning process entailed, what were stable farming households lost their homes, their land use rights, and their means of livelihood. The city of Zigong, on the other hand,

112. In the Zigong case there was the additional promise of jobs in factories to be built on the requisitioned land. When finished, however, the project contained only luxury housing and commercial space. Pils, *supra* note 106, at 246.

pocketed the difference between the amount of compensation to the farmers and the amount paid by the developers, while simultaneously accelerating the growth of the city.

The final step in this story is the role of the courts, where we all put our hopes for property rights enforcement. By the late 1990s, when it had become apparent both that the promised jobs were not forthcoming and that required procedures had not been followed, a group of displaced residents led by a relatively rich and well-educated farmer named Liu Zhengyou brought an action in the Sichuan Intermediate People's Court to declare the requisition illegal. The court immediately dismissed the action and prohibited any further appeal. Liu then refiled the action, this time with 1,300 co-plaintiffs.[113] This was also rejected, but Liu did not stop and headed to Beijing in 2000 to pursue both legal and less formal means of redress. For the next few years, he continued to press his case, succeeding at times in getting central authorities to pay some attention, including orders from the center to Sichuan authorities to look into the complaints.[114] In the end, however, all legal and political appeals failed. Despite what appear to have been substantial grounds for both administrative and judicial review, Liu and his 1,300 co-plaintiffs never got their day in court.

It seems clear that property rights were not respected in Zigong, either initially in the requisitioning itself or by the courts on judicial review. Equally important, even if the specific legal irregularities of Zigong had been avoided, it appears that the Chinese system of property rights in land fundamentally distorts the incentives for investment, use, and transfer in land, and in doing so violates just about all of the pro-property rights strictures of the law and development canon. And yet China continues to grow, and the lack of property rights arguably accelerates the process. As we saw in the review of the

113. *Id.* at 266.

114. After the judiciary refused to accept his case, Liu turned to the less formal letters and visits system [*xinfang*]. *See* Carl Minzner, *Xinfang: An Alternative to the Formal Chinese Legal System*, 42 STAN. J. INT'L L. 103 (2006) (providing an overview of the *xinfang* system). Through this process Liu was able to speak to someone in the Supreme People's Court and was given an "official letter" addressed to the Sichuan Provincial Higher Level People's Court instructing that court to "receive him and take care of him conscientiously." Pils, *supra* note 106, at 267-268.

literature, however, the law and development community seems indifferent. We now turn to possible explanations for this lack of curiosity.

IV. Why Has the Chinese Experience Had So Little Impact on Law and Development Theory?

In August, 2008, the World Bank redefined the measure of extreme poverty from $1 a day to $1.25 a day, immediately increasing the number of poor as of 2005 from 1 billion to 1.4 billion.[115] The Bank's chief economist nonetheless claimed that the world was on target to meet the goal of halving poverty by 2015, noting that the number of extreme poor had decreased from 1.9 billion in 1981, a drop of 500 million in 24 years and a reduction in the rate of poverty in the developing world from 52% to 26%.[116]

Within these statistics lurks a fact that bears directly on my argument. During this time period, China reduced the rate of its citizens in poverty from 84% to 16%.[117] Even more startling, the absolute number of Chinese freed from extreme poverty was 628 million.[118] In other words, without the decrease in poor Chinese, the number of global poor would have *increased* by 128 million people. The director of the Bank's Development Research Group characterized China's accomplishment as unprecedented: "I don't think that we've ever seen anything in human history that's comparable."[119] The point for our purposes is that the Chinese have done so without instituting policies consistent with the conventional wisdom of law and development theorists. The starkness of the challenge to Western economic theory is further illustrated by one datum: Between 1988 and 1998, the Chinese economy went from half the size of Russia's to twice its size, Russia of course being a country famous for largely *following* the advice of American economists.[120]

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115. N.Y. Times, *supra* note 61.

116. *Id.*

117. Ravallion Q&A, *supra* note 2, at Question 16.

118. Justin Lin, the World Bank's chief economist, stated that between 1981 and 2005 the number of people in poverty in China fell from 835 million to 207 million. N.Y. Times, *supra* note 61.

119. Ravallion Q&A, *supra* note 2, at Question 16.

120. Qian, *supra* note 56, at 297-98. By 2006, the life expectancy of Russian men had declined to less than 59 years, as opposed to over 70 in China.

Economic growth and social advancement of this magnitude, one would think, would attract the rapt attention of those dedicated to reducing world poverty. But such has so far not been the case in the field of law and development. In this section I ask why the literature pays so little attention to what is one of development's great success stories. I begin with that old bugaboo of Asian area specialists: Eurocentrism that sees Asia as too exotic to be relevant to the rest of the world.

A. *China as Exotica*

The Orientalist explanation would go something along the lines of the following: "Oh yes indeed, China is very important, but China is *so* different!" It is true that a reader certainly gets more than a whiff of that attitude in reading *The Bottom Billion*, and one is left with the feeling that Collier is either overwhelmed by the idea of Chinese achievement or oblivious to it. This cannot be said of the World Bank, however. In June 2008, Justin Yifu Lin, a Chinese economist from Peking University, became Senior Vice President and the Bank's first chief economist from a developing country,[121] and Bank economists are beginning to write about Chinese governance structures.[122] Furthermore, it is hard to characterize scholars like Collier as Eurocentric when they have devoted much of their careers to sub-Saharan Africa. Still, it is worth noting that in his preface Collier notes the international diversity of his research group: four Europeans (one each from the United Kingdom (Collier), France, Germany, and Sweden), two Americans, an Australian, and a Sierra Leonean.[123] With

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THE ECONOMIST, *supra* note 40, at 202. For a gripping description of how Western economists led by Jeffrey Sachs argued for a "big bang" approach to the transition to a market economy, overriding the advice of Russian economists who advocated a gradualist approach similar to China's, *see* Marshall Pomer, *Introduction*, *in* THE NEW RUSSIA: TRANSITION GONE AWRY 1-11 (Lawrence R. Klein & Marshall Pomer eds., 2001).

121. World Bank Chief Economist: Justin Yifu Lin, http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/0,,contentMDK:20273940~menuPK:477175~pagePK:64165401~piPK:64165026~theSitePK:469372,00.html.

122. *See* Philip Keefer, *Governance and Economic Growth*, *in* DANCING WITH GIANTS: CHINA, INDIA, AND THE GLOBAL ECONOMY 211, 211-42 (L. Alan Winters and Shahid Yusuf, eds., 2007) (an example of a World Bank economist writing about China governance structure).

123. COLLIER, *supra* note 38, at xiii.

the exception of the last, it is a group of nations with very similar perspectives, and, one surmises, a group of individuals whose training has included little attention to the experience of China or the other countries of northeast Asia.

It is also true that China has fewer historical ties to Europe than does much of the developing world. The West did its best to dominate China and the rest of Asia militarily and politically in the nineteenth and twentieth centuries, but it never succeeded in full-scale colonialization, and there was never a full-blown colonial civil service as there was in much of Africa and parts of South and Southeast Asia. Then there is the language, which is more difficult to master, particularly to read, than Spanish, French, or English, languages which will get a researcher pretty far in many parts of the developing world. All that said, however, attributing the lack of attention to China to cultural narrow-mindedness seems a mistake. First, although Europe never formally colonized the whole of China, it colonized or otherwise occupied large parts of it. Second, the World Bank, the IMF, and their national counterparts are thoroughly cosmopolitan institutions. Third, and most important, blaming Eurocentrism would miss what is a more fundamental issue that affects law and development research about all parts of the world. In other words, my guess is that even if Paul Collier were to add a Chinese economics Ph.D. to his research team, little would change.

B. *Seeing Like an Economist*

Instead, I believe that much of the explanation lies in the way economists understand the world. Put starkly, they simplify and generalize. This approach is not new, and it is not limited to economists. Over two millennia ago, Zhuangzi described two kinds of birds: those who flew high and saw a large part of the world but knew little in detail, and those that hopped along the ground and knew much about one small corner of the world. More recently James Scott described the editing of reality necessary for a government to implement policy:

> Certain forms of knowledge and control require a narrowing of vision. The great advantage of such tunnel vision is that it brings into sharp focus certain limited aspects of an otherwise far more complex and

> unwieldy reality. This very simplification, in turn, makes the phenomenon at the center of the field of vision more legible and hence more susceptible to careful measurement and calculation. Combined with similar observations, an overall, aggregated, synoptic view of a selective reality is achieved, making possible a high degree of schematic knowledge, control, and manipulation.[124]

A few aspects of this way of knowing, which Scott calls "seeing like a state," bear emphasis. First, to understand any social phenomenon, one must focus on it, which in turn means eliminating from view everything else. To focus, one must define, then employ the definition to distinguish. Once distinguished from its environment, the phenomenon can be observed, but observation is valuable to a policymaker only if it can be compared to similar phenomena and generalizations formed, which means it must be measured. Measurement requires creating standard metrics that generalize the particular. In doing so, metrics convert the different into the identical by first creating categories of the similar and eventually, if the scale of understanding requires, making the similar identical. Once phenomena have been standardized, they can be compared and "an overall, aggregated, synoptic view of a selective reality" becomes possible.

Although Scott links seeing like a state with Soviet collectivization and similar disasters of the twentieth century, there is nothing inherently sinister in simplification for the purpose of understanding. Indeed, life could not go on without it, and in this sense Zhuangzi's bird metaphor is appropriately nonjudgmental. Problems arise only when an observer forgets that the result of the process is not knowledge of social reality but of an artificial abstraction designed to understand one aspect of reality. Unfortunately, there are two features of the law and development field that may make such absentmindedness more frequent than it would otherwise be: the contemporary emphasis on mathematical modeling in the training of econo-

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124. JAMES SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 11 (1998); *see also* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE (1996) (investigating the appeal of quantitative objectivity and the impetus for its use in business, government, and social research).

mists, and the brutal fact that the World Bank must attempt to understand and act in the *entire world*.

The two features are interrelated. If one wants to know whether it would be wise policy to advise developing countries to strengthen property rights, one legitimate approach would be to ask whether property rights are important to investment as a general matter. A natural way to answer that question is to ask whether countries with property rights have higher levels of investment than those without, and acquiring these data by surveys and quantitative analysis is quicker, easier, and more comprehensible than sending social scientists to probe each jurisdiction in depth. To conduct such surveys, however, one must "see like a state." There is simply no other way to generalize about the condition of the almost two hundred separate legal systems that exist in the world. But it is not merely necessity that drives the process. Numbers are not only simple; they are also clear. They provide a basis for decisionmaking that, despite their creators' knowledge to the contrary, lend themselves to illusions of objectivity and certainty. When aggregated, numbers allow for conclusions of breathtaking scope, wide enough to encompass the world.[125]

Although Scott's cautions relate to all efforts to make the complex comprehensible, there may be a particular danger when such statistical techniques are applied to legal phenomena. It is not that the operation of legal rules in any given society is uniquely complex. What makes the application of quantitative methodologies to law particularly fraught with danger is that legal phenomena come with a tempting short cut to understanding that is fundamentally misleading. That short cut is to mistake the formal rules of a given legal system with its actual operation and, even more problematic, with

125. The need for quantitative data can be illustrated by Kaufmann et al.'s attempt in *Governance Matters* to measure governance around the world. The authors acknowledged that their data were imprecise and subjective but argued that they were useful nonetheless because they "provide a convenient and consistent summary of the available evidence" and because they "enable formal statistical tests of cross-country differences in governance instead of arbitrary comparisons." Kaufmann et al., *supra* note 16, at 11. In other words, when you must compare 200 legal systems, you are going to have to use standardized data no matter how imperfect they may be.

human behavior in regard to the rules.[126] The scholars and practitioners who conduct these surveys are well aware of this difference, and their surveys attempt to account for them. Nonetheless, it is very difficult to discuss "law" in general policy terms without reducing law to rules. Thus, whatever the subtlety in survey design, when someone like Ibrahim Shihata urges the Bank to pay attention to the rule of law, he almost inevitably falls back on phrases like "a set of rules which are known in advance [and] are actually in force."[127] This tendency may be even greater in economists, who may be more likely than lawyers to take rules as representations of how legal institutions operate in practice. Rules also, like numbers, have the seductive advantage of being comparable without reference to context or practice.

If the above analysis is correct, law and development practitioners and scholars will have an understandable tendency to simplify legal social phenomena by converting them to quantitative data about rules. This tendency, in turn, will make them less likely to take a close look at what happens in China or any other individual country. Understanding how assets are managed in TVEs and how one part of the Chinese economy shifted wealth from public to private ownership may well be useful to understanding the process of economic growth, but it has two significant disadvantages to anyone who has to decide what policy advice to give to developing countries across the globe. First, discovering how China has handled transitional issues is difficult, time consuming, politically sensitive, and requires skills and perspectives that are foreign to most researchers. Second, even when one acquires an understanding of Chinese techniques, it is questionable whether they are transferable to other developing countries. Indeed, as Chen's

126. This sentence is not meant to imply that this mistake is applicable only to quantitative methods of understanding the law. It applies equally well to doctrinal methods. Nor is it meant to imply that quantitative methods are not useful in studying legal phenomena. My point is simply that interpreting formal rules as "law in action" is a particularly easy mistake to make because legal rules are proclaimed to be a statement of what human behavior should be in that society. There is no similar short cut for an observer interested in understanding something like the operation of an American Marine platoon on patrol along the Afghan-Pakistani border or the childrearing practices of two-career couples in New York City.

127. SHIHATA, *supra* note 13, at 273.

work on the villages of Shuang and Hancun demonstrate, they may not even be readily transferable within China. In other words, even if the World Bank took the time and spent the money to investigate in depth the circumstances that have allowed China to make these transitions so successfully (in terms of economic growth), the knowledge may be of limited practical use.[128]

C. *Avoiding the Unacceptable*

Learning about China in depth is hard, and the payoff in terms of generally applicable policies may be small. Cross-national surveys by contrast provide instantly accessible data that appear directly applicable to other developing countries. These qualities alone would be reason enough for the average law and development practitioner to make the choices they have, but I believe that there is a deeper and still more interesting reason. A close look at the process of Chinese growth would reveal a truth that would directly contradict the conventional economic wisdom that property rights are necessary for economic growth. This truth is that, although the protection of investment expectations may be necessary for market transactions in ordinary times, rapid economic development requires changing underlying social structures, not preserving them.

Growth is a painful process that destroys as it creates, as the United Nations put it over fifty years ago:

> Ancient philosophies have to be scrapped; old social institutions have to disintegrate; bonds of caste, creed and race have to burst; and large numbers of persons

128. This would not be because China is different from the rest of the world, but because it is just like the rest of the world in the sense that the way it fashions growth will be fundamentally contingent on its own circumstances, resources, history, and opportunities. Lessons from Chinese experience or, as Randall Peerenboom puts it, a Chinese model may well be useful to other developing countries, but unless dramatically simplified, it cannot provide generally applicable formula for development. *See* CHINA MODERNIZES, *supra* note 4 (describing the Chinese "model" of alternative modernity to liberal democracy and how it may supplant those models presented by Russia and Chile).

> who cannot keep up with progress have to have their expectations of a comfortable life frustrated.[129]

Growth is change, and change means that existing productive technologies and social structures must give way to make way for new ones.[130] Since, as Douglass North put it over three decades ago, "property rights are always embedded in the institutional structure of a society,"[131] growth will require changing property rights. This is precisely what happened in Labrador when Demsetz's Native American hunters privatized the forest and it is precisely what is happening in contemporary China as the preexisting structures of public ownership give way to mixed and private ownership structures, and assets that had been the property of the whole people become private property.

Reform in China, however, is just the latest example of this process. The destruction of common usufruct rights to rural land by enclosure in sixteenth- to nineteenth-century England substantially increased agricultural productivity and transformed rural society, but in doing so it destroyed an established way of life. We see a similar change in eighteenth-

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129. ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 3 1995) (quoting U.N. DEP'T OF SOC. & ECON. AFFAIRS, MEASURES FOR THE ECONOMIC DEVELOPMENT OF UNDERDEVELOPED COUNTRIES 15 (1951)).

130. Douglass North recognized long ago that economic growth engenders "immense modern social problems:" "Adjustment entails a total societal transformation. Impersonal exchange, minute specialization and division of labour, a radical reduction in information costs, and world-wide interdependence entail a complete transformation of every aspect of societal organisation." He further recognized that it has been the "flexibility of the political and economic institutions of Western economies" that has enabled the West to deal with the social dislocation of growth, noting even that economic change will require "recontracting" that may "sometimes . . . require an alteration in the rules." Douglass C. North, *The New Institutional Economics and Third World Development*, *in* THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 17, 22 (John Harriss et al. eds., 1995); *see also* INSTITUTIONAL CHANGE, *supra* note 35, at 51-2 (discussing the persistence of inefficient property rights and the need for institutional change); STRUCTURE AND CHANGE, *supra* note 35, at 190 (discussing the transformation of property rights in 19th Century America). North's recognition of the need to "transform" or "alter" property rights does not seem to have survived as institutional economics was translated into law and development theory and practice.

131. NORTH & THOMAS, *supra* note 8, at 5.

and nineteenth-century American water law from a doctrine that required that riparian owners protect the "natural flow" of water, and hence prohibited its diversion by mills or pollution by industry and mining.[132] This shift facilitated the conversion from an agrarian society to an industrial one but, like the English enclosures, it also destroyed the "expectations of a comfortable life" embodied in existing property law.

Each time this process occurs—and it has occurred innumerable times in human history[133]—property rights must be changed. While in the abstract it is both fairer and more efficient to compensate the holders of existing property rights, doing so is costly, difficult, and often neglected.[134] Even when attempted, it is invariably incomplete and functions more to legitimate the exercise of power than to vindicate the rights of the property owners. That is what happened in the agrarian revolution of the English enclosures and the industrial revolution in America, and it is what happened in the land reforms carried out in Taiwan and Japan after World War II.[135] In each of these instances, the legal system played a role, but it was not the one assigned to it by law and development doctrine. Instead of preserving existing property rights, the legal system legitimated their destruction.[136]

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132. *See, e.g.*, Pa. Coal Co. v. Sanderson, 6 A. 453, 453 (1886) (shifting Pennsylvania from a natural flow doctrine to a reasonable use doctrine). The natural flow doctrine would have given the plaintiffs an injunctive right to stop the defendant coal mine's pollution of a common water way; the reasonable use doctrine allowed a balancing of utilities that inevitably favored the coal mine over the plaintiffs' fish pond.

133. *See, e.g.*, Thomas Buoye, *Litigation, Legitimacy, and Lethal Violence: Why County Courts Failed to Prevent Violent Disputes over Property in Eighteenth-Century China*, *in* CONTRACT AND PROPERTY IN EARLY MODERN CHINA 94 (Madeleine Zelin et al. eds., 2004) (detailing how this process has occurred often in China).

134. *See* Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1012 (2006) (arguing that in many Third World countries property systems are greatly complicated by interactions among legal, normative, and institutional arrangements).

135. RONALD DORE, LAND REFORM IN JAPAN (1959). For an account of the political effect of the Japanese land reform, see James Babb, *Making Farmers Conservative: Japanese Farmers, Land Reform and Socialism*, 8 SOC. SCI. JAPAN J. 175 (2005).

136. The role of the courts in these transformations was much more complex than portrayed here, and amounted to much more than the facilitation

The question for us here, however, is not the role of courts in previous property transformations or even the courts' abdication in the one now taking place in China. It is the distinct question of why development theorists are not actively investigating these transformations. One reason may be that quantitative methodologies, which may well be the only methodologies available for generalizing about global development, render such transformations too costly to explore or even invisible, but I wonder whether the reason may not be even more deeply embedded in their world view. Recognizing that economic growth requires in practice the destruction of property rights would directly repudiate a central tenet of the law and development canon. It may literally be too much for researchers imbued with rule of law orthodoxy to contemplate.

V. Conclusion

Before closing, it is necessary to reiterate the limited ambition of my claim and to speculate briefly on the political implications of China's economic success.

First, by arguing that China has grown without property rights, I do not claim that economic actors in China or elsewhere do not require security from private theft and state expropriation. Nor do I dispute the wisdom of institutional economics, at least as exemplified by Douglass North's work. On the contrary, my working definition of property rights is much narrower than his definition of institutions and my analysis should highlight, not obscure, the crucial question of what institutions China has used to play the role that conventional law and development theory would attribute to the formal legal system.

Second, I do not argue that property rights are undesirable. I do argue that they are not necessary from the perspective of increasing per capita GDP, but that is a blunt measure indeed. If one is interested in more comprehensive measures of social wellbeing, the ability of Zigong city to expand without

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and obfuscation of theft. Institutionally strong courts and judges slowed the process and lessened the level of social dislocation. *See, e.g.*, Thompson, *supra* note 11 (describing the contributing factors leading to the passage of the Black Act as well as the consequences). Indeed, it is the failure of Chinese courts so far to play a similar role that is disappointing.

the cost of fair compensation or the delay of proper consultation becomes much less normatively attractive. Even if one dismisses issues of justice and focuses on narrow economic growth, there is the open question of whether the social conflict engendered by property disputes will in the long run derail Chinese development, however that development is measured.

Third, I cannot disprove the claim that the Chinese experience demonstrates only that economic growth without robust property rights can take a society only so far before stalling for want of sophisticated legal institutions. This is possible, but there seems little reason in 2009 for Chinese leaders to turn away from their incremental pragmatism and embrace Western legal systems as a means to guarantee stable and sustainable growth.

This article does not attempt to settle these important issues. Mine is the less ambitious point that law and development theory misses two important truths about economic growth: First, that growth requires structural change[137] and, second, that property rights are unlikely to be the best way to provide the flexibility necessary for sustained economic activity during these transitions. Since the structural changes required of growing societies are both more pressing and more fundamental than the incremental changes required by growth in mature ones, I argue that law and development theory would be well advised to shift its focus from how legal institutions can be reformed to preserve existing property interests

137. As Joseph Schumpeter phrased it, "[c]apitalism . . . is by nature a form and method of economic change and not only never is, but never can be stationary." JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 82 (Routledge 1994). For him, the process of economic growth "incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism." *Id.* at 83. In a footnote qualifying this process, he notes that "Those revolutions are not strictly incessant: they occur in discrete rushes which are separated from each other by spans of comparative quiet." *Id.* at 83 n.2. Schumpeter was not explicitly discussing the institutional needs of developing countries, but his distinction between revolutions and periods of relative quiet may represent the distinctions between developing countries, which must undergo fundamental structural change, and developed ones, which have the privilege of enjoying periods of comparative quiet.

to how institutions can render these transformations more efficient and less socially disruptive.

Such institutions might be legal,[138] but if we advocate legal reform as central to the process of development, we must be clear-headed as to what it can and should achieve. Otherwise reform will not only fail to achieve its goals but may also make a mockery of law. After hundreds of pages of chronicling the "shams and inequities" of English law and its failure to prevent the injustices of the enclosure movement, E. P. Thompson famously concluded: "But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."[139] Thompson was making a political point, not an economic one, and legal reforms within the development process must be justified politically, not economically. If China's experience with property rights tells us anything, it is not that property rights are an indispensable means of accelerating economic growth, but that they might be a way to alleviate its pain. If legal reformers continue to equate property rights with economic growth, they will not only fail in their immediate goal of increasing the GDP, but also miss their true role, empowering the citizen to oppose "power's all-intrusive claims."

138. *But see* Keefer, *supra* note 122. In one of the more bizarre turns in law and development ideology, Philip Keefer, Lead Economist of the World Bank's Development Research Group and one of the foremost advocates of the necessity of property rights, recently addressed Chinese economic growth and decided that the governance mechanism that provided the security needed for capitalist development was not judicially enforced property rights as he and so many others had long assumed, but the checks and balances enforced by a revitalized and disciplined Leninist political party, i.e., the Chinese Communist Party.

139. THOMPSON, *supra* note 11, at 266.